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In The

Supreme Court of the United States

BOY SCOUTS OF AMERICA AND MONMOUTH COUNCIL, BOY SCOUTS OF AMERICA,

Petitioner,

v.

JAMES DALE,

Respondent.

On Writ Of Certiorari
To The Supreme Court Of New Jersey

BRIEF OF THE AMERICAN BAR ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether, in reliance on First Amendment expressive association claims, a federally chartered unselective membership association found to be a "place of public accommodation" under a state non-discrimination statute may lawfully expel a member in contravention of that statute solely because of his sexual orientation.

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INTEREST OF AMICUS CURIAE

The American Bar Association, with more than 400,000 members across the United States, is the leading national membership organization of the legal profession.[1] Its members include attorneys in private practice, attorneys for nonprofit organizations and for corporations, prosecutors, public defenders, legislators, law professors and students, and non-lawyer associates in related fields.[2]

The Association has adopted numerous policies that seek to rid the legal profession, the judicial process, and the laws of this country of invidious discrimination in its various forms, including bias against gay men, lesbians, and bisexuals. Among these policies is one adopted by the ABA House of Delegates in February 1989 "urg[ing] the Federal government, the states and the local governments to enact legislation . . . prohibiting discrimination on the basis of sexual orientation in employment, housing

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[1] This brief is filed with the consent of both petitioners and respondents, and letters reflecting those consents have been lodged with the Clerk of this Court. Pursuant to the Court's Rule 37.6, *amicus curiae* ABA states that this brief has not been authored in whole or in part by counsel for a party and that no person or entity, other than *amicus*, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief.

[2] Neither this brief nor the decision to file it should be interpreted to reflect the views of any judicial member of the American Bar Association. No inference should be drawn that any member of the Judicial Division Council has participated in the adoption of or endorsement of the positions in this brief. This brief was not circulated to any member of the Judicial Division Council prior to filing.

and public accommodations." The anti-discrimination law sought to be enforced here is precisely the type of legislation advocated by the Association. In 1995, the Association submitted an *amicus curiae* brief to this Court in the case of *Romer v. Evans*, Docket No. 94-1039, to oppose a restriction on the ability of political subdivisions of a state to adopt such anti-discrimination measures.

The Association also has addressed bias, including bias based on sexual orientation, in the courts, within the profession itself, and in legal education. In 1990, for example, the House of Delegates adopted Canon 3B(5) of the Model Code of Judicial Conduct, requiring judges (and those subject to the judges' direction and control) to refrain from words or conduct that "manifest bias or prejudice, including but not limited to bias or prejudice based upon race, religion, national origin, age, disability, sexual orientation, or socioeconomic status." The judicial canons also bar judges from membership in organizations that engage in discrimination.

As a private membership organization, the Association has a direct and significant concern about discrimination in public accommodations. In 1983, for example, the Association endorsed amendments to Title II of the Civil Rights Act of 1964 to include private clubs that derive substantial revenue from business sources. In 1988, the Association adopted a policy urging its members not to hold business or professional functions at clubs that discriminate.

The common thread running through all these policy statements is that invidious discrimination, including discrimination on the basis of sexual orientation, should be eliminated in all civic and professional settings.

At the same time, the members of the Association share a deep professional and philosophical commitment to the principle of freedom of expression. Many of those members have used their skills as advocates in defense of that principle, often at great personal cost, and the Association remains committed to protecting the First Amendment whenever genuinely expressive activities are at stake. In enacting its anti-discrimination policies, however, the Association has affirmed its belief that the First Amendment does not deny the states the means to guarantee to all their citizens the full benefits of participation in political, economic, and cultural life.

For all of these reasons, the Association has a strong interest in the matter before the Court.

SUMMARY OF ARGUMENT

The New Jersey Supreme Court, having found that Boy Scouts of America ("BSA") is a "public accommodation" under the New Jersey Law Against Discrimination ("LAD"), properly applied the principles of *Roberts v. United States Jaycees*, 468 U.S. 609 (1984), to determine that BSA cannot bar individuals from membership on the basis of sexual orientation.

In *Roberts*, this Court fashioned an effective and comprehensive framework for weighing the compelling government interest in eradicating discrimination against competing First Amendment claims asserted by private associations. The *Roberts* framework has enabled courts throughout the United States to protect First Amendment rights without jeopardizing the equally important efforts by the states and the federal government to combat the corrosive effects of discrimination.

A key component of the *Roberts* framework requires a group claiming First Amendment immunity from generally applicable anti-discrimination laws to demonstrate that a protected First Amendment interest is seriously burdened by the law as applied. 468 U.S. at 626. Where the claim concerns the right of expressive association, a court must identify the expressive purposes that bring the group together, assess whether application of the anti-discrimination law at issue imposes a serious burden on the association's expressive activity, and then determine whether any such burden is justified by a compelling state interest unrelated to the suppression of ideas. By taking a hard look at the *bona fides* of the First Amendment claim, the court is able to dispose of weak and pretextual assertions while preserving First Amendment values against genuine encroachment. Without such close scrutiny, efforts to combat invidious discrimination would be blocked by the group's talismanic incantation of First Amendment protection to shield its discriminatory practices.

Here, the New Jersey Supreme Court properly applied the *Roberts* framework by first examining BSA's expressive message, and then determining that enforcing

the LAD does not impose a serious burden on that message.

Reversal of the careful decision below, which appropriately followed this Court's controlling precedents, would have serious and troubling consequences for efforts to combat discrimination of all kinds.

ARGUMENT

I. This Court's Precedents Have Established An Appropriate Framework For Balancing The Compelling State Interest In Eradicating Discrimination Against Competing First Amendment Claims By Private Associations, And The Court Below Properly Applied Those Precedents In This Case.

A. The *Roberts* Framework Requires Close Judicial Scrutiny Of Assertions That Compliance With Anti-Discrimination Laws Seriously Burdens Constitutional Rights Of Expressive Association.

In *Roberts v. United States Jaycees*, 468 U.S. 609 (1984), this Court addressed freedom of expressive association claims advanced by the Jaycees in its effort to avoid admitting women as required by the Minnesota Human Rights Act. The Jaycees, an all male, private membership organization, was, like BSA, dedicated to worthy civic, patriotic, educational, and personal goals. *See id.* at 612-13. This Court noted the potential threat to the First Amendment right of expressive association embodied in "a regulation that forces the group to accept members that it does not desire," but observed that "[t]he right to

associate for expressive purposes is not . . . absolute." *Id.* at 623. The Court continued:

> Infringements on [the right to expressive association] may be justified by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms.

Id. In applying the least restrictive means analysis, the Court held that "the Jaycees has failed to demonstrate that the Act imposes any serious burdens on the male members' freedom of expressive association." *Id.* at 626. In its inquiry, the Court identified the expressive purposes that brought the Jaycees together, and then determined whether application of the anti-discrimination statute unduly burdened those expressive purposes. The Court did not accept the Jaycees' assertions at face value, but rather looked to the record for evidence that the admission of women would seriously burden the Jaycees' protected expression. After careful review of the facts, the Court found "no basis in the record for concluding that admission of women as full voting members will impede the organization's ability to . . . disseminate its preferred views." *Id.* at 627.

The Court rejected the Jaycees' claim that the very fact that the Jaycees was all male was itself an expressive statement, holding that "any claim that admission of women as full voting members will impair a symbolic message conveyed by the very fact that women are not permitted to vote is attenuated at best." *Id.* Significantly, the Court firmly refused to accept the Jaycees' conclusory claim based on sexual stereotyping that admission of

women would change the expressive message of the Jaycees. *Id.* at 628.

This Court reaffirmed the *Roberts* approach in *Board of Directors of Rotary International v. Rotary Club of Duarte*, 481 U.S. 537 (1987), and in *New York State Club Association, Inc. v. City of New York*, 487 U.S. 1 (1988). In making its determinations, this Court required the membership organizations to demonstrate that complying with a non-discrimination statute would seriously burden their members' expressive purpose in coming together. The Court looked behind the organizations' bare assertions of a First Amendment violation to inquire into their actual expressive purposes and the evidentiary bases for their claims that their organizations' expressive activities would be harmed. Such inquiry into the character and content of the core messages that bring an association together is necessary to prevent the "scuttling" of a valid law by pretextual assertions concealed as First Amendment claims. *See Dale v. Boy Scouts of America*, 706 A.2d 270, 287 (N.J. Super. Ct. App. Div.), *aff'd*, 734 A.2d 1196 (N.J. 1998).

Roberts does not require a reviewing court to judge the *validity* of an association's expressive purpose. It requires only that the court determine whether expression actually is burdened in any significant way by compliance with the anti-discrimination law. Thus, the inquiry is akin to that undertaken in the free exercise context, where a court must inquire, as a threshold question, into whether asserted religious beliefs are sincerely held. *See United States v. Seeger*, 380 U.S. 163, 184 (1965). By contrast, Petitioner's insistence that a reviewing court "must give deference to an expressive organization's

characterization of its own beliefs," Pet. Br. at 26, would force courts to accept fabricated statements of belief as license to discriminate.

In *Roberts, Rotary International,* and *New York Club Association,* this Court concluded that the burden, if any, of an anti-discrimination law on the organizations' respective expressive purposes was not significant enough to outweigh the governmental interest. Application of the *Roberts* test does not, however, invariably result in enforcement of an anti-discrimination statute because the outcome of the analysis depends upon the facts of each case. In appropriate situations, courts have permitted private membership organizations to maintain restrictive membership policies where First Amendment freedoms were genuinely and seriously burdened by anti-discrimination statutes.

For example, in *Hart v. Cult Awareness Network,* 16 Cal.Rptr.2d 705 (Cal. Ct. App. 1993), the Court of Appeal of California completed a thorough analysis relying on *Roberts* and *Rotary International* before concluding that the Cult Awareness Network ("CAN") could exclude members of the Church of Scientology without violating California's Unruh Civil Rights Act. *Id.* at 705-6.

Applying the *Roberts* framework, the *Hart* court ruled that requiring CAN to admit Scientologists as members would "impede [CAN's] ability to engage in protected activities and to disseminate its preferred views," and therefore would seriously infringe upon CAN's freedom of expressive association pursuant to *Roberts. Id.* at 712.

As advocates, the members of the American Bar Association are deeply committed to First Amendment

freedoms, including the right of expressive association. In the case before this Court, however, there is simply no showing comparable to that in *Hart* that enforcement of the LAD would seriously infringe upon BSA's freedom of expressive association. Accordingly, the decision below should be affirmed.

B. The New Jersey Supreme Court Properly Held That Compliance With New Jersey's Law Against Discrimination Does Not Unconstitutionally Burden BSA's Right Of Expressive Association.

The New Jersey Supreme Court properly followed the *Roberts* framework by first examining BSA's expressive message, and then determining that the application of the LAD to prohibit its dismissal of Dale did not impose a serious burden on that message.

1. There Is No Persuasive Evidence That BSA Holds Any Genuine, Non-Pretextual View Regarding Homosexuality, Or That Any Such View Is A Central Or Significant Element Of The Organization's Expressive Purpose.

In its review of the record, the New Jersey Supreme Court found that:

> [BSA's] ability to disseminate its message is not significantly affected by Dale's inclusion because: Boy Scout members do not associate for the purpose of disseminating the belief that homosexuality is immoral; Boy Scouts discourages its leaders from disseminating any views

> on sexual issues; and Boy Scouts includes sponsors and members who subscribe to different views in respect of homosexuality.

Dale v. Boy Scouts of America, 734 A.2d 1196, 1223 (N.J. 1998).[3]

BSA concedes that it does not express overt views against homosexuality in its official materials, but rather that any such policy is a tacit one. *See* Pet. Br. at 5 ("Official Scouting materials addressed to the boys do not refer to homosexuality or inveigh against homosexual conduct"); *id.* at 21 ("Boy Scouting does not convey an explicit 'anti-gay' message to the boys under its care"). Similarly, BSA concedes that its view on homosexuality is, at most, incidental to the organization's beliefs. *See* Petition for Writ of Certiorari, at 24 ("Boy Scout members associate in order to promote a certain set of moral values, of which the view that homosexuality is immoral *is merely a small part.*") (emphasis added). These admissions belie BSA's contention here that a view against homosexuality is a central or significant part of BSA's expressive purpose, a contention that is not rescued by an unpublished BSA "position paper" or by statements against homosexuality published by BSA in connection with other litigation, *see* Pet. Br. at 5-6; *Dale*, 734 A.2d at 1204 n.4. Similarly, there has been no credible evidence

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[3] The courts below also found BSA's claim that opposing homosexuality is an important part of its expressive purpose to be inconsistent with the fact that BSA accepts significant amounts of financial support and sponsorship from churches and other organizations that strenuously disagree with BSA's discrimination on the basis of sexual orientation. *Dale*, 734 A.2d at 1224-25; 706 A.2d at 290-91.

presented to support BSA's claim that the values of being "morally straight" and "clean" expressed in the Scout Oath and the Scout Law, respectively, pertain at all to sexuality, much less homosexuality, as opposed to such virtues as "reverence, patriotism, and a desire for self-improvement." *See Roberts* at 636 (O'Connor, J., concurring); *Dale*, 734 A.2d at 1223-25.

The New Jersey Supreme Court's conclusions in this regard are consistent with Justice O'Connor's observation in her concurrence in *Roberts* that "[e]ven the training of outdoor survival skills or participation in community service might become expressive when the activity is intended to develop good morals, reverence, patriotism, and a desire for self-improvement." *Roberts* at 636 (O'Connor, J., concurring). Indeed, the New Jersey Supreme Court acknowledged that "Boy Scouts expresses a belief in moral values and uses its activities to encourage the moral development of its members." *Dale*, 734 A.2d at 1223. But, as that court noted, encouraging "moral development" does not reflect a specific view on homosexuality, any more than it does on abortion, the use of contraceptives, divorce, euthanasia, or myriad other controversial moral issues on which BSA has no stated position.[4]

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[4] In fact, the Girl Scouts of the U.S.A. has an explicit policy of non-discrimination with respect to sexual orientation. *See Mailand v. Girl Scouts of the U.S.A.*, No. 93-CV-949, 1994 U.S. Dist. LEXIS 8290 (W.D. Mich. Apr. 11, 1994).

2. Eradicating Discrimination In Public Accommodations, Including Discrimination Based On Sexual Orientation, Is A Compelling State Interest.

New Jersey enacted its Law Against Discrimination in 1945. The statute was based in part on a finding by the state legislature that "because of discrimination, people suffer personal hardships, and the State suffers a grievous harm." These personal hardships were found to include:

> [E]conomic loss; time loss; physical and emotional stress; and in some cases severe emotional trauma, illness, homelessness or other irreparable harm resulting from the strain of employment controversies; relocation, search and moving difficulties; anxiety caused by lack of information, uncertainty, and resultant planning difficulty; career, education, family and social disruption; and adjustment problems . . . .

N.J. Stat. Ann. § 10:5-3 (West 1999) (Finding and Declaration of Legislature).

The LAD was intended to combat racial and other forms of discrimination that were recognized at the time of its enactment. In the decades since then, amendments have been adopted to prohibit newly recognized forms of discrimination. New Jersey amended the LAD to cover discrimination based on sexual orientation in 1991, just two years after the ABA adopted its policy encouraging the enactment of such laws. *Id.* § 10:54. The amendment was an "implicit recognition" by the legislature that the "archaic" and "stereotypical" notions so deplored in *Roberts* with respect to gender discrimination, *see Roberts*,

468 U.S. at 625, also "cannot be countenanced" with regard to sexual orientation discrimination. *Dale*, 734 A.2d at 1227 (quoting 706 A.2d at 287). The New Jersey legislature explicitly found that discrimination in places of public accommodation, including discrimination on the basis of sexual orientation, is a matter "of concern to the government of the State, and that such discrimination threatens not only the rights and proper privileges of the inhabitants of the State but menaces the institutions and foundation of a free and democratic State. . . . " N.J. Stat. Ann. § 10:5-3.

In amending its anti-discrimination law to include prohibitions against sexual orientation discrimination, New Jersey embraced a growing national movement toward recognition that discrimination based on sexual orientation is as debilitating and destructive as other forms of discrimination and that these different manifestations of prejudice are closely linked. *See* Gordon W. Allport, *The Nature of Prejudice* (1954); Albert D. Klassen et al., *Sex and Morality in the U.S.* 206-24 (Hubert O'Gorman ed. 1989). At least nine States, the District of Columbia, 74 cities, and 18 counties have enacted laws that prohibit sexual orientation discrimination in public accommodations. *See* Wayne Van Der Meide, National Gay and Lesbian Task Force, Legislating Equality: A Review of Laws Affecting Gay, Lesbian, Bisexual, and Transgendered People in the United States 4-5, 25-82 (2000). Some 1,600 employers, including corporations, law firms, universities, professional associations (including the American Bar Association), and governmental units, have adopted anti-discrimination policies that cover sexual orientation discrimination in employment.

See Human Rights Campaign, WorkNet Employer Database (March 20, 2000) <http://hrc.org/worknet>.

Indeed, this Court itself has recognized that laws against discrimination based on sexual orientation are equal in kind and in legal dignity to anti-discrimination laws benefiting other classes, *see Romer v. Evans*, 517 U.S. 620, 631 (1996), and has held that a state may not constitutionally prohibit local governments from enacting such laws. *Id.* at 635-36; *see also* Brief of American Bar Ass'n, Amicus Curiae, in Support of Petitioners, *Romer* (Docket No. 94-1039).

This Court long has recognized that eradication of discrimination is a compelling state interest. *See, e.g., Bob Jones Univ. v. United States*, 461 U.S. 574, 604 (1984) (race); *Roberts*, 468 U.S. at 623-26 (gender). The District of Columbia Court of Appeals has reached the same conclusion with regard to discrimination based on sexual orientation. *See Gay Rights Coalition of Georgetown Univ. Law Ctr. v. Georgetown Univ.*, 536 A.2d 1, 33 (D.C. 1987) (en banc). In concluding that the state interest was compelling, the court in *Gay Rights Coalition* noted that the District of Columbia Council had:

> determined that a person's sexual orientation, like a person's race and sex, for example, tells nothing of value about his or her attitudes, characteristics, abilities or limitations. It is a false measure of individual worth, one unfair and oppressive to the person concerned, one harmful to others because discrimination inflicts a grave and recurring injury upon society as a whole. . . . Only by eradicating discrimination based on sexual orientation, along with all other forms of discrimination unrelated to individual merit, could the District eliminate recurrent personal injustice and build a society which encourages and expects the full contribution of *every* member of the community in all their diversity and potential.

Id. at 32 (emphasis in original).

As this Court has noted, discrimination "deprives persons of their individual dignity and denies society the benefits of wide participation in political, economic, and cultural life." *Roberts*, 468 U.S. at 625. Such discrimination takes many forms and causes many different kinds of harm. In seeking to distinguish *Roberts*, Petitioners suggest that the harm is greater where the purpose of the association is primarily commercial (such as the Jaycees) rather than primarily expressive: "Participation in such business and professional organizations is important to equality of opportunity in the commercial marketplace, and the First Amendment protection of their exclusionary practices is correspondingly lower." Pet. Br. at 35.

Yet this ignores the serious and perhaps irreparable harm that is done to young men who are arbitrarily excluded by BSA. They not only lose the opportunity to develop the kinds of skills that are conveyed as a part of the scouting experience, but also are unable to participate with their peers in what for most communities in this country is an important rite of passage to adulthood. The fact that they may not derive immediate commercial advantage from this activity does not lessen the deprivation to which they are subjected.

The court below examined this theme in detail as part of its determination that, under the New Jersey law,

BSA deprived Dale of the benefits of a "public accommodation." The court found that, among other advantages, BSA "indirectly benefits its members through the 'advantage' of a large influential network, including Air Force Academy, Annapolis and West Point graduates, Rhodes Scholars, astronauts, United States Presidents and Congressmen, as well as businessmen and community leaders." *Dale*, 734 A.2d at 1218. The court also found that BSA maintains and benefits from close relationships with numerous federal, state, and local government entities. *Id.* at 1211-13. BSA affords its members the chance to participate in those relationships, to become familiar with important institutions of self-government, and to develop a confident sense of civic involvement that can serve as the foundation for a lifetime of engaged citizenship.

All in all, BSA is an important training ground for leaders in commerce, politics, and society generally. It is precisely to keep such gateways to opportunity unbarred by prejudice that the American Bar Association has adopted its policies against discrimination and, in keeping with those policies, supports enforcement of the LAD in this case.

3. The Holding Below Is Consistent With This Court's Decision In *Hurley*.

As the New Jersey Supreme Court correctly held, *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995), is a "pure speech" case that does not control the outcome here. In *Hurley*, the Court held that the organizers of a parade – a quintessential and historically venerated form of speech, *see id.* at 568-69 – could not be forced by anti-discrimination laws to permit marchers to carry banners proclaiming gay rights

messages at odds with the organizers' beliefs.[5] A contrary result would have required the parade organizers "to modify the content of their expression to whatever extent beneficiaries of the law choose to alter it with messages of their own." *Id.* at 578.

Apart from such "pure speech" contexts, however, courts have been unwilling to apply *Hurley* to cases in which the First Amendment is invoked as a license for discriminatory practices. For example, in *Elks Lodges #719 (Ogden) and #2021 (Moab) v. Department of Alcoholic Beverage Control*, 905 P.2d 1189, 1196 (Utah 1995), the Utah Supreme Court rejected a fraternal organization's attempt to use *Hurley* to defend its exclusion of women in violation of the Utah Civil Rights Act. As the Utah court recognized, "*Hurley* addressed only the right to control the content of a parade's 'message' under the First Amendment's guarantee of free speech; it specifically did not address the issue of participation of protected groups in the parade." *Id.* The court concluded that "*Hurley* has no application to the issues presented by [a public accommodation's] decision to wholly exclude an entire class of society from participation." *Id.*

Similarly, in the decision below, the New Jersey Supreme Court correctly ruled that *Hurley* was inapplicable, finding that "Dale's status as a scout leader is not

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[5] It is notable that even in this context, the Court found the Massachussetts statute prohibiting sexual orientation discrimination a legitimate exercise of "the State's usual power . . . when a legislature has reason to believe that a given group is the target of discrimination . . .." 515 U.S. at 572.

equivalent to a group marching in a parade," and that "Boy Scout leadership [is not] a form of 'pure speech' akin to a parade." *Dale*, 734 A.2d at 1229. The court recognized that enforcement of the LAD would not force BSA to endorse homosexuality, or, indeed, to make any statement at all on that or any other subject. *Id.*

Accordingly, even if the issue of homosexuality implicated BSA's right of expressive association, the organization's exclusionary policies bear no rational relationship to the effectuation of this expressive purpose. Dale did not seek to use his role in the organization to advance an expressive purpose of his own that diluted or undermined the message that the organization was attempting to convey. Although Petitioner attempts to paint Mr. Dale as an "activist" who seeks to use a position in Boy Scouts as a "bully pulpit" to promote or celebrate homosexuality, *see* Pet. Br. at 22, 24, in fact none of the statements Petitioner attributes to Mr. Dale was made until after his dismissal by BSA, and none was made in a BSA venue or in the course of Boy Scout activities. *See Dale*, 734 A.2d 1204-05. Indeed, Petitioner concedes that at the time it expelled Mr. Dale, he was away at college and had "very little involvement" with BSA at all. Pet. Br. at 8. Petitioner learned of Mr. Dale's homosexuality and campus-based gay rights activities from a newspaper article, *id.*, *not* from anything Mr. Dale said or did while engaged in BSA activities. In the absence of any credible evidence that Mr. Dale attempted to impose a message upon BSA, BSA's refusal to tolerate his mere presence in the organization is an unjustifiable departure from the requirements of the law.

II. Failure To Scrutinize Petitioner's First Amendment Claims As *Roberts* Requires Not Only Would Hinder New Jersey's Laudable Effort To Eradicate Sexual Orientation Discrimination, But Also Would Jeopardize States' Efforts To Combat Other Forms Of Discrimination.

The American Bar Association is committed to the elimination of discrimination in *all* its forms. *See, e.g.*, Canon 3B(5), discussed above, which is one of numerous Association policies that seek to address bias or prejudice, including bias or prejudice based on sexual orientation, in a comprehensive fashion.

Similarly, the state interest embodied in the LAD should be seen as an undifferentiated whole: the State of New Jersey has a compelling interest in eliminating discrimination in the many forms enumerated in the statute; it does not have a stronger or more compelling interest in combating some forms than in combating others.

For the same reason, there is more at stake in this or any other civil rights case than the rights of the particular group members involved in the matter at hand. What this Court decides will affect not only James Dale and the community to which he belongs, but also those belonging to other communities whose rights have found vindication through the methodology enunciated in *Roberts*.

Since the *Roberts* decision, state courts consistently have declined the invitation to read into the Court's approach a license for private membership organizations to engage in exclusionary practices upon the mere invocation of the freedom of expressive association. *See, e.g., Lloyd Lions Club v. Int'l Ass'n of Lions Clubs*, 724 P.2d 887

(Ore. App. 1986) (rejecting claim of national membership organization that application of Oregon Civil Rights Act to require admission of women violated members' right to freedom of expressive association); *Fraternal Order of Eagles, Inc. v. City of Tucson*, 816 P.2d 255, 258 (Ariz. Ct. App. 1991); *Elks Lodges #719 (Ogden) and #2021 (Moab) v. Dep't of Alcoholic Beverage Control*, 905 P.2d 1189, 1196 (Utah 1995). *See also Isbister v. Boys' Club of Santa Cruz, Inc.*, 707 P.2d 212, 214 (Cal. 1985) (application of California Civil Rights Act to require local boys club to admit girls implicates a compelling state interest and does not substantially infringe on the freedom of expressive association).

Like the New Jersey Supreme Court in the decision below, these state tribunals diligently applied the *Roberts* framework, sensitively balancing the competing claims presented when an anti-discrimination statute is asserted against a private membership organization.

Should the Court now reject the *Roberts* approach, or reinterpret it to permit a less exacting review of First Amendment claims of the kind that Petitioner asserts, it would create a dangerous and unnecessarily broad exception to laws that are the primary means by which the states have chosen to redress discrimination within their borders.

CONCLUSION

The judgment of the New Jersey Supreme Court should be affirmed.

Respectfully Submitted,

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